In The

Supreme Court of the United States

No. 76-776

E. L. PADERICK, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

LEROY BOONE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court–State Library Building
Richmond, Virginia 23219

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PRELIMINARY STATEMENT

E. L. Paderick, Superintendent of the Virginia State Penitentiary, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on September 13, 1976, in the case of *Leroy Boone* v. *E. L. Paderick, Superintendent of the Virginia State Penitentiary.*

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia, Norfolk Division, of February 25, 1975, is not reported, but is included herein as Appendix A (App. p. 1). The decision of the United States Court of Appeals for the Fourth Circuit, dated September 13, 1976, is reported in 541 F.2d 447, and is included herein as Appendix B (App. p. 19).

JURISDICTION

The jurisdiction of this Court to issue the Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Reversing The Decision Of The United States District Court For The Eastern District Of Virginia On The Theory That The Prosecutor Had Concealed An Offer Of Favorable Treatment Made By Police To Defendant's Principal Accuser And That Such Concealment Constituted A Denial Of Due Process?

STATEMENT OF THE CASE

On May 24, 1968 Leroy Boone was convicted in the Circuit Court of Virginia Beach, Virginia, of armed robbery and burglary, and sentenced to life imprisonment plus twenty years. He appealed these judgments to the Supreme Court of Virginia, which affirmed the convictions on January 21, 1969.

After seeking habeas corpus relief in both state and federal courts on various grounds, Boone filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia on July 24, 1974, alleging that under *Giglio* v. *United States,* 405 U.S. 150 (1972), the failure of the Commonwealth to disclosed an alleged offer by a police detective of favorable treatment to Boone's principal accuser, one Eugene Hargrove, constituted a prejudicial denial of due process. Hargrove was an accomplice of Boone in the robbery and burglary for which Boone was convicted.

An evidentiary hearing was conducted on November 18, 1974, and testimony was taken concerning the circumstances surrounding the offer by the detective to Hargrove. On February 25, 1975, the District Court denied and dismissed the petition. (See Appendix A.)

In his petition, Boone claimed that Hargrove's testimony against him was the product of a deal whereby the prosecution agreed not to charge Hargrove with the offenses if he would cooperate in the prosecution of Boone. He further alleged that the Assistant Commonwealth's Attorney trying the case, Joseph Lyle, had misled the jury into believing that no deal had been made and that Hargrove's testimony was not tainted by a grant of immunity.

Upon the evidence received at the plenary hearing, the District Court found that a deal was struck between the investigating detective and the witness, that Hargrove was not promised immunity but was simply promised that the detective with whom he spoke would not personally arrest him, that although the detective promised to use his influence with the Commonwealth's Attorney's office, both he and Hargrove understood that the decision on his prosecution was completely out of their hands (Appendix A at 7-8), that Hargrove was aware that an element of risk was involved on his part (Appendix A at 9), and that Hargrove was ultimately not prosecuted for those offenses he had committed with Boone (Appendix A at 11). The District Court also observed that while the prosecutor stressed the

testimony of Hargrove in his argument and represented to the jury that this testimony was the product of an active conscience, the defense attorney countered this representation with a very forcefcul argument that Hargrove's testimony must have been the product of a deal whereby he would cement the Commonwealth's case against Boone in exchange for his freedom (Appendix A at 10). The District Court held that because of the risky nature of the deal and Hargrove's knowledge of the risk, the fact that the deal was made by a police detective rather than by the prosecutor's office, the extent of the evidence against Boone in addition to Hargrove's testimony and the inherent weakness of Hargrove's testimony as exposed by defense counsel, Boone's state court trial was not so unfair as to necessitate a new trial (Appendix A at 18).

The United States Court of Appeals for the Fourth Circuit, in reversing the District Court below, essentially relied upon this Court's decision in *Giglio* v. *United States, supra.* The Court found that "because the prosecutor concealed an offer of favorable treatment to Boone's principal accuser" and because that Court felt that there was a "reasonable likelihood that . . . [the] verdict might have been different" if the jury had known of "the prosecution witness' compell'ng motivation to establish Boone's guilt," under such circumstances there was a denial of due process under *Giglio* v. *United States, supra; Brady* v. *Maryland,* 373 U.S. 83 (1963); *Mooney* v. *Hollohan,* 294 U.S. 103 (1935) (Appendix B at 19).

STATEMENT OF FACTS

At approximately 4:00 a.m. on January 14, 1968, a business establishment known as L. M. Sandler & Sons in Virginia Beach was broken into by three Negro males who

robbed the night watchman, one Julius Selby, at gun point, of approximately $7,000.00 in cash and $13,000.00 in checks and government bonds. The building had been closed for the night and was maintained by the watchman. The night watchman was caught unaware and was tied up with an electric wire and a belt. One of the three individuals who committed the crime used a .38 calibre revolver, and the money, including silver dollars, bonds and jewelry was taken after the criminals broke through the wall and into a vault.

The night watchman, Julius Selby, testified at trial that on the morning in question he heard noises and then a man came in the door with a gun, told him to cooperate, and he would not be hurt. During the course of the robbery, Selby was extremely nervous, and he later was able to provide only general descriptions of the men, plus a description of the type of jacket and color of same worn by the gunman.

Several weeks after the robbery, an individual by the name of Wallace Hines, who was a suspect in another crime, advised the police that he had heard Leroy Boone remark that Sandler's Seafood was "hit" by Boone and Eugene Hargrove. Hines also advised the police that he had found certain bonds with the Sandler name thereon in a remote area. Hines directed the police to that area and it was established that the bonds found there were taken in the robbery of Sandler's. Hines also stated that he had observed Boone flashing a roll of money shortly after the time of the robbery. Based upon the information from Hines, the police then questioned Eugene Hargrove, who admitted his part in the robbery and agreed to testify on behalf of the Commonwealth. Hargrove testified at Boone's trial to the effect that Boone, Hargrove, and another defendant named Herbert Billups had committed the burglary and robbery

in question, had tied up the watchman, and had taken the goods and money. He identified Boone as being the one with the gun, a .38 calibre pistol.

On February 23, 1968, an automobile which Boone had recently purchased was seen in Virginia Beach by R. L. Robbins, a Virginia Beach detective. Robbins observed what appeared to be a hip length jacket on the back seat of the car, and concluded that the jacket fit the description of the one worn by the gunman in the robbery. After observing the jacket, Robbins proceeded to secure a search warrant based upon his sworn affidavit. Boone's vehicle was then searched for a revolver, but no weapon was found. A box of .38 calibre bullets was found, however, either under the seat or in the glove compartment. An individual named Fay Simpson testified at Boone's trial that she had gone with Boone to the location where the bonds were discovered and that Boone had made the remark, "Somebody got it." Additionally, Simpson testified that the defendant had asked her to change her testimony. The Commonwealth also introduced evidence to show that Boone had purchased an automobile shortly after the robbery, paying $700.00 in cash for it. Also, a flashlight was found at the scene of the crime which was subsequently identified as belonging to Boone.

At Boone's trial, one of the witnesses for the Commonwealth was Eugene Hargrove, an admitted accomplice with Boone in the commission of the burglary and robbery in question. Hargrove testified about the commission of the robbery and about Boone's participation therein. On cross-examination, Hargrove admitted that he had not been charged with any offense in connection with the crime, and he knew of no pending charges. He also admitted that he had spent his portion of the proceeds of that robbery and had not been forced to return it, and that he had spent no time in jail as a result of the charges (Trial Tr. at 114-

117). He never actually denied being made any promises concerning future prosecutions, and there was no testimony at trial as to whether or not Hargrove had been made a promise of "immunity." The question asked Hargrove by defense counsel on cross-examination was, "After this trial did they [the police] tell you that you were going to be charged with it [the crime]?" Hargrove's answer was, "I don't know" (Trial Tr. at 116). Detective Coffield, one of the investigating officers, admitted in his testimony that Hargrove had not been charged with the crime.

The defense counsel, in closing argument, placed considerable emphasis on the fact that Hargrove had not been charged with the crimes and was not incarcerated (Trial Tr. at 271-273, 276-279, 286-288). This was an attempt on the part of the defense counsel to raise questions as to the credibility of the witness, Hargrove, and to imply that his testimony had in some way been elicited falsely in exchange for promises of "immunity," or other actions of the Commonwealth to the effect that Hargrove could not be prosecuted for the crimes in question. In final rebuttal argument the Assistant Commonwealth's Attorney who tried the case, Joe Lyle, told the jury:

> "Now as I say, it's up to the Commonwealth which can designate in what order these cases are to be tried. We chose to try Boone today, separately, and that's our law-given right. And I take exception to Mr. Brydges' inferences that Mr. Hargrove will walk the streets free the rest of his life . . ." (Trial Tr. 289-290).

At that point defense counsel asked for a mistrial on the basis that the Commonwealth's Attorney was telling the jury a fact that he had not established by the evidence. The trial court in response stated, "The jury is going to consider the evidence that was presented here on

the witness stand. I recall Mr. Hargrove stated that he was not charged at this point. And that is as much as the jury can consider. And I think arguments should be limited to that."

At the habeas corpus plenary hearing held in the District Court on November 18, 1974, Detective Coffield of the Virginia Beach Police Department testified that he and Detective Robbins initially interviewed Eugene Hargrove at police headquarters concerning the burglary and robbery of Sandler's Seafood. This interview took place about two or three days before the arrest of Leroy Boone on February 29, 1968. At the initial interview at police headquarters Hargrove made no statements and gave no information to the police; however, Coffield gave him his phone number and told him that if he should change his mind and would want to talk about it that he should call Coffield. Later on that same day Hargrove called Coffield and said that he wanted to meet the detective and talk about the case. A meeting was arranged for that evening at a place designated by Hargrove in a remote area of the city, and the meeting was held with no one else present other than Detective Coffield and Eugene Hargrove. The meeting took place in the officer's unmarked police car, with both persons in civilian clothes. Detective Robbins was aware of the fact that the meeting was being held and had stationed himself nearby in his car, although not close enough to actually participate in the meeting in any way.

At this meeting in Coffield's car, Coffield told Hargrove that he knew all about Hargrove's participation in the crimes in question and solicited Hargrove's cooperation. Hargrove agreed to do so and also agreed to testify on behalf of the Commonwealth. In exchange for Hargrove's cooperation and testimony Detective Coffield told Hargrove that he, Coffield, would not arrest Hargrove for that charge.

A full discussion of this testimony is contained in the District Court's Memorandum Order (Appendix A at 3-8).

When questioned on cross-examination at the plenary hearing, Detective Coffield was asked whether he told Hargrove that "no one" would arrest Hargrove on that charge. Coffield's answer was:

> "No. I told him that I was handling this case along with Detective Robbins, and that I would use my influence, too, with the Commonwealth's Attorney's Office in order to see that, hopefully, that he would not be arrested. He understood there was an element of risk there, although he believed me."

When asked what would be that element of risk, Detective Coffield replied that Hargrove brought out in the discussion that "somebody else could arrest me." Coffield also advised Hargrove that he was aware that other crimes had been committed by Hargrove, Boone, and Billups, and Coffield also told Hargrove that he, Coffield, would not charge Hargrove with those other offenses.

At the plenary hearing Detective Coffield also testified that he had advised the Assistant Commonwealth's Attorney, Joe Lyle, about the results of his meeting with Hargrove, and advised Mr. Lyle that Hargrove would testify, and had not been charged with the crimes, although he had admitted his participation therein. Even though Coffield admitted that he had promised Hargrove that he himself would not arrest Hargrove on any other related crimes committed by Hargrove, Boone, and Billups, it was brought out at the plenary hearing that Hargrove was in fact subsequently arrested on the burglary of Bayside School, a break-in which occurred at about the same time as the break-in of Sandler's Seafood and which was supposedly committed by the same three individuals. This arrest was by Detective

Zello of the Virginia Beach Police Department, and Detective Zello's information on this came from Leroy Boone and the arrest of Hargrove by Zello was completely and totally independent from Coffield's investigation of the Sandler break-in. In fact, the arrest of Hargrove for the break-in of Bayside School occurred about a year later. Hargrove was tried on this charge and at the trial he pled guilty to a lesser included offense and was convicted on a misdemeanor. At that time Coffield, who had only recently found out about the subsequent arrest by Detective Zello, appeared on the day of trial and advised Hargrove and his attorney that he was prepared to testify in Hargrove's behalf, if they felt it would be beneficial to him. Coffield's desire to testify on behalf of Hargrove was based to some extent on Coffield's promises made to Hargrove at the time of the investigation of the Sandler Seafood offenses.

Detective Coffield also testified that he did consult with the Commonwealth's Attorney, Mr. Evans, because Evans planned to charge Hargrove with the Sandler Seafood offenses and based upon the fact that Hargrove had cooperated with the Commonwealth, to recommend leniency. Coffield indicated that this was some time after Boone's trial and that his discussion with Mr. Evans was in effect to advise him about his meeting with Hargrove and the promises he had made to Hargrove to use whatever influence he had to prevent Hargrove's being arrested and charged with those offenses. However, Andre Evans did testify at the plenary hearing and indicated that he had no independent recollection of these discussions with Detective Coffield.

Detective Coffield specifically testified that he did not promise Hargrove "immunity" and that he did not promise him that he would never be arrested and charged, only that he himself would not do so. Detective Robbins also

testified at the plenary hearing, but was not able to recall whether any discussions in the matter of Coffield's promises to Hargrove were brought to the attention of the Commonwealth's Attorney's Office, even though he, Robbins, had discussed this matter directly with Detective Coffield. Assistant Commonwealth's Attorney Joe Lyle testified that he had no recollection of being told about Coffield's promises to Hargrove. He further indicated that he would not have been surprised at all if Hargrove had been charged, and indicated only that he would be surprised if Hargrove were not dealt with more leniently because of his agreement to cooperate with the Commonwealth. Joe Lyle further testified that Coffield's promises to Hargrove would not have prevented the Commonwealth's Attorney's Office from prosecuting Hargrove. Lyle also stated that his rebuttal argument at Leroy Boone's trial was accurate, because Hargrove had not been promised immunity or anything else by the Commonwealth's Attorney's Office, and at the time of Boone's trial the Commonwealth's Attorney's Office still did have the right to decide whether or not to charge Hargrove.

ARGUMENT

The United States Court Of Appeals For The Fourth Circuit Erred In Reversing The Decision Of The United States District Court For The Eastern District Of Virginia On The Theory That The State Prosecutor Had Concealed An Offer Of Favorable Treatment Made By A Police Detective To Defendant's Principal Accuser And That Such Concealment Constituted A Denial Of Due Process.

It is respectfully submitted that the Opinion of the United States Court of Appeals granting habeas corpus relief in the case at bar constitutes a major misapplication of this Court's decision in *Giglio* v. *United States, supra,* justifying review by this Court on a Writ of Certiorari.

In *Giglio,* the government had failed to disclose a promise made to its key witness that he would not be prosecuted if he testified for the government. At the trial in that case, the witness testified that nobody told him he would not be prosecuted. Furthermore, the prosecutor, in closing argument, stated that the witness "received no promises that he would not be indicted." It later developed that a prosecutor different from the one who tried Giglio had in fact promised Giglio that he would not be prosecuted, in effect a promise of immunity.

The holding of this Court in *Giglio* was that a new trial should be granted where the state allows false evidence to go uncorrected, and where the result of this action is material to the outcome of the case in that it affected the reliability of a witness whose testimony was probably determinative on the issue of guilt or innocence. In other words, a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. As pointed out by the opinion of this Court, *Giglio* met the test, because the government's case depended almost entirely on the testimony of the witness in question—"Without it there could have been no indictment and no evidence to carry a case to the jury." His credibility as a witness was, therefore, an essential issue in the case, and evidence of the promise of immunity was relevant to his credibility. Yet, evidence was presented to the jury directly to the point that such a promise of immunity had not been given, even though in fact it really had.

It is submitted that the instant case is clearly distinguishable from *Giglio* and that the Fourth Circuit Court of Appeals erred in finding a violation of constitutional due process upon *Giglio.*

In the first place, there was no promise of *immunity* given to the witness, Hargrove, in the instant case, and the District Court so found as a fact that Hargrove was not

promised immunity. The only promise given to Hargrove was a promise by Detective Coffield that he, Detective Coffield, would not arrest Hargrove for these charges, and that if Hargrove was arrested by anyone else or was prosecuted that Coffield would use whatever influence he had with the Commonwealth's Attorney's Office to prevent such prosecution. However, it was clearly brought out that Hargrove understood that there was no actual immunity being granted, and that there was an element of risk that someone else would arrest Hargrove on the charges or that the Commonwealth's Attorney's Office would go ahead and prosecute anyway despite any possible influence to the contrary by Detective Coffield.

Furthermore, the instant case is distinguishable from *Giglio,* because the instant case is not one involving a situation where false evidence goes uncorrected. Nowhere at Leroy Boone's trial was it ever denied as such that Hargrove had been granted immunity. Hargrove himself did not deny any grant of immunity and did not state that he had not been promised anything. The question asked him was whether he knew that he was not going to be charged with the offenses, and his answer was that he did not know. This was, in fact, a correct and truthful statement, because there was a possibility that he could still be charged with the offenses, and he did not know whether or not he would in fact be charged. He only knew that Coffield himself would not arrest him on those charges. Therefore, there was no false testimony on the part of Hargrove to the extent that it placed a burden on the prosecution to correct such false evidence.

More importantly, the credibility of Hargrove was fully brought into question before the trier of fact by the cross-examination of defense counsel of Hargrove. It was fully and forcefully brought before the jury that Hargrove had not been charged with any crimes at the time of Boone's trial,

had not yet served any jail time of any kind, even though he admitted his involvement in the crimes, and had in fact benefited from the fruits of the crime without being challenged by the State in any way for that benefit. In addition, the jury was instructed by the Court on the issue of credibility in accordance with the law.

The instant case is also distinguishable from *Giglio* in connection with the question of the statement made by the Commonwealth's Attorney in closing argument. In *Giglio,* the prosecutor specifically denied any grant of immunity to the witness. In the instant case the only statement of the prosecutor was to the effect that the prosecutor's office still retained the right to charge Hargrove in the future if they should decide to do so. This was entirely a correct statement in fact, as shown by the testimony of the Assistant Commonwealth's Attorney at the habeas corpus plenary hearing. Furthermore, the statement by the prosecutor in closing argument was elicited only in rebuttal to the argument put forth by defense counsel in an effort to attack the credibility of the witness and to imply to the jury that the witness, Hargrove, had been granted some form of immunity. Again it was a situation of substantially correct statements before the jury, which did not have to be corrected as false evidence at some later point. Therefore, the instant case is not a situation of false evidence going uncorrected or of the failure of the Commonwealth to bring forward evidence of any grant of immunity. This is particularly true since there was no grant of "immunity."

Notwithstanding the interpretation given the prosecutor's closing argument by the United States Court of Appeals, i.e., that the prosecutor had related "emphasis upon altruistic motivation" on the part of Hargrove, it is respectfully maintained that the prosecutor's remarks were a fair statement of the facts as they stood at that time. The decision had not been made by the prosecutor's office at that time not to

prosecute Hargrove; and, indeed, Hargrove was doing "the right thing," as the prosecutor put it in closing argument, when he elected to relate what he knew and to testify. The fact of some expectation of leniency was not denied by Hargrove, who testified that "they told me it would be better for me to help them" (Trial Tr. at 116), in spite of the interpretation of the United States Court of Appeals that Hargrove had made a "general denial of any promise of leniency." Unfortunately, the Court of Appeals utilized these interpretations to find "false evidence." The Court opined that "Hargrove's general denial of any promise of leniency, when coupled with the prosecutor's emphasis upon altruistic motivation, constitutes false evidence of which the prosecutor knew or should have known" (Appendix B at 24).

Even if there had been a form of immunity granted in the instant case, and even if false evidence had gone uncorrected, it is still submitted that the instant case is distinguishable from *Giglio,* because in the instant case the question of credibility of the witness, Hargrove, was not essential to the question of guilt or innocence. Contrary to the situation in *Giglio,* the prosecution of Leroy Boone did not depend entirely on the testimony of the witness in question, and even without the testimony of the witness in question there could have been an indictment and prosecution of the petitioner, and there would have been enough evidence to carry the case to the jury. Therefore, Hargrove's credibility as a witness was not an essential issue in this case in the same way that it was in *Giglio.*

In the instant case, Boone could have been convicted on the testimony of Hines, to the effect that Boone had admitted in Hines' presence that he had broken into Sandler's and to his display of a roll of money and the fact that he had taken Hines to the place where the fruits of the crime were hidden. Furthermore, there was evidence tending to

connect Boone with the crime, since he had purchased a car immediately after the crime with a substantial amount of cash, since a jacket was found in his car which matched the description given by the victim of the crime, and upon the testimony of the witness, Fay Simpson, that Boone had told her that he had stolen some money.

The District Court, in its opinion, found, in effect, that even if there was error, through a technical violation of the *Giglio* requirements, that any such error in the instant case was harmless (Appendix A at 17). It is submitted that the reasoning of the District Court was proper, and shows a correct reading of the facts in the instant case. Furthermore, for the reasons indicated herein, petitioner submits that the application of *Giglio* by the United States Court of Appeals for the Fourth Circuit to find a violation of due process in the instant case is a serious and incorrect extension of the meaning of that decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the petitioner in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 7th day of December, 1976, I mailed copies of the foregoing Petition for a Writ of Certiorari to Barry Nakell, Esquire, Maurice Sercarz, Esquire, and Joseph Delk, Esquire, School of Law, University of North Carolina, Chapel Hill, North Carolina, counsel for respondent.

JERRY P. SLONAKER
Assistant Attorney General

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 74-309-N

Leroy Boone,
Petitioner

v.

E. L. Paderick, Superintendent, etc.,
Respondent

MEMORANDUM ORDER

Leroy Boone, the petitioner in this action, is a prisoner of the State of Virginia. He seeks a writ of habeas corpus from his conviction in May of 1968 by a jury in the City of Virginia Beach on charges of armed robbery and statutory burglary, for which conviction he is presently serving a sentence of life plus twenty (20) years. He was granted a plenary hearing on his petition, which was held in this Court on November 18, 1974. After due consideration of the evidence presented at the hearing and a careful review of the transcript of Boone's criminal trial, this Court concludes that petitioner Boone is not entitled to his release.

The crime for which petitioner is now serving time occurred in the early morning hours of January 14, 1968, when three young men broke into Sandler's Seafood distribution center in Virginia Beach and broke open a safe while holding an elderly night watchman at gunpoint. Large quantities of cash, b nds, and jewelry were taken. The watchman was tied up but otherwise left unharmed. One of the participants in this crime was a Eugene Hargrove[1] who, admitting his participation, took the stand as a prosecution witness during Boone's trial and testified that Boone had been the leader of the trio that robbed Sandler's. In his petition, Boone charges that Hargrove's testimony was the product of a deal whereby the prosecution agreed not to charge Hargrove with the robbery if he would cooperate against Boone. It is further alleged that the Assistant Commonwealth's Attorney trying the case, Joseph Lyle, misled the jury into believing that no deal had been made and that Hargrove's testimony was not tainted by a prosecution promise of immunity, and that this action by the Assistant Commonwealth's Attorney violated petitioner's rights to due process as set forth in *Giglio* v. *United States,* 405 U.S. 150 (1972). The Commonwealth, on the other hand, claims that no such promise of immunity was given, that Hargrove has in fact been prosecuted for a related crime, and that the *Giglio* standards have therefore not been violated. The Commonwealth also argues that, even if the prosecutor's actions were improper, any resulting error was harmless.

The primary witness at petitioner's plenary hearing was Eugene Coffield, Jr., a detective sergeant with the Virginia Beach Police Department. Coffield was the officer in charge of investigating the Sandler robbery and several other break-

[1] It was never firmly established at the hearing whether the name was was Hargrow or Hargrove. For the sake of consistency, this opinion will refer to the witness as Eugene Hargrove.

ins in Virginia Beach, and it was he who allegedly promised Hargrove immunity from prosecution in return for Hargrove's cooperation in the investigation. The key portions of Coffield's testimony at the plenary hearing are as follows:

> Q Prior to the arrest of Mr. Boone and Mr. Billups, did you have any conversations with Mr. Hargrove?
>
> A I did.
>
> Q Briefly tell the Court what these conversations involved.
>
> A Well, I would suspect that it was the latter part of February, 1968. My recollection is that on the 29th of February Leroy Boone was arrested by myself and Lieutenant Robbins. Approximately two to three days prior to Leroy Boone's arrest, I had the occasion to interview, talk to William Eugene Hargrove. At that time he was advised by myself that I knew what had happened, and who participated in the robbery and burglary of Sandler's Seafood located on Northhampton Boulevard. I told him that we were prepared, within a short period of time, to make arrests, and I told him exactly what I knew his part to be, and I also requested his cooperation.
>
> Q Did you receive his cooperation?
>
> A Yes, sir, we did. (Plenary Hearing Transcript, pages 25-26).
>
> Q What specifically was the cooperation that he gave you?
>
> A Well, he cooperated to the extent that he agreed at that time to become a prosecution witness. And he, in fact, was.
>
> Q In exchange for becoming a prosecution witness, what did you promise him?

A I told him that I would not arrest him for that charge (Plenary Hearing Transcript, page 26).

Q Did you ever communicate the contents of this particular informal meeting to either the Commonwealth's Attorney, Andre Evans, or any of his assistants, and if so, when?

A Oh, yes. Of course, the Commonwealth's Attorney Assistant, Joe Lyle, prepared and represented the Commonwealth in the trial of Leroy Boone. And, of course, I told him everything, which is standard, of course, of what happened. He knew that Hargrove was a principal and had not yet—had not been charged at that time.

Q And this was, of course, prior to the trial?

A Right. We have what we call pretrial conferences where at the last minute the prosecution gets the witnesses together, and the person who is in charge of the case, and we discuss the case. And this was brought out by myself to Mr. Joe Lyle. (Plenary Hearing Transcript, pages 27-28).

Q At that conference at that time, did Mr. Hargrove tell you what he knew about the break-in of Sandler's?

A Yes, he did.

Q And he implicated Mr. Boone and Billups?

A Yes, sir.

Q Now, you told him, your testimony was that you told him you would not arrest him on that charge?

A That is correct.

Q Did you tell him that no one would arrest him on that charge?

A No. I told him that I was handling this case along with Detective Robbins, and that I would not personally arrest him. And I would use my influence too, with the Commonwealth's Attorneys Office, in order to see that, hopefully, that he would not be arrested. He understood there was an element of risk there, although he believed me.

Q What would be that element of risk?

A Well, because he brought out, "Somebody else could arrest me."

I told him, "I am handling this particular case. However, I cannot say that the Commonwealth Attorney will not direct that you be charged with this. But I will use my influence with his office."

Q With the Commonwealth Attorney's office?

A With the Commonwealth Attorney, so he understood there was an element of risk.

Q Did you make him any promises in connection with any other charges?

A Yes. There were several charges, and I told him that we were aware, which we were, because he verified only what I knew, and added very little that I did not know. I told him that I would not charge him with those other offenses. Now is the time I told him that if he was to come clean with me with his association with the two other persons, Boone and Billups, I said I would not charge him with those offenses. Again I used the word, "I." I expressed I would not charge him with that, and as a result he did state a few other things he had been involved with. (Plenary Hearing Transcript, pages 31-32).

Q Now, after that conversation that evening with Mr. Hargrove, did you have any subsequent conversa-

tions with Mr. Hargrove concerning any such promises that you had made? At any other time did Mr. Hargrove come to you and remind you about these promises, or did you ever discuss it with him again, in other words?

A No. I believe my next meeting with him was following the arrest of Boone and Billups. They were arrested in front of each other at different times. I forget the times time span. Hargrove attended the lower court, General District or Police Court hearings at which time the case was sent to the Grand Jury, and my recollection is that, of course he testified at lower court hearings. That was the best that I can recall, the next meeting I had with Hargrove. And we met at court. Following court he went off in his own way.

Q Was there any discussion at that time about any promise that you had made, or any deal with him in any way?

A No, sir. I don't know. I am assuming that he thought what was done was done, and he was hoping I would keep my word to do what I could. We had no further discussions, to my recollection of this, at all.

Q Any subsequent time?

A Not following that. (Plenary Hearing Transcript, pages 32-33).

Q Did you at any subsequent time inform Joe Lyle specifically what you had told Hargrove?

A Yes, sir, I am positive of that.

Q Was that prior to Boone's trial?

A I would think this was prior to the trial, immediately prior to the trial, and preparing the case.

Q Did Mr. Lyle make any response to you at that time that you can recall?

A Not that I can recall.

Q Was any discussion held with Mr. Lyle as to whether or not the prosecutor would in fact go ahead and charge Mr. Hargrove?

A Mr. Lyle was of the opinion at that time that perhaps this could have been handled a different way. I believe he was perhaps quoted publicly in this, but he stated, and I recall him stating that perhaps if Hargrove was charged the Commonwealth would recommend leniency. (Plenary Hearing Transcript, pages 35-36).

Q Going back again to your conversation with Mr. Hargrove that night in your car, did you specifically tell him that he would never be prosecuted by anybody for the break-in of Sandler's?

A I told him that I would not charge him.

Q You never promised him that nobody would?

A I couldn't promise him that.

Q Did you ever use the word, "immunity."

A I don't think Hargrove knew what the word, "immunity," was. I am sure I didn't use it in talking with him.

Q So your conversation was in laymen's terms that he could understand?

A Yes, sir. (Plenary Hearing Transcript, pages 37-38).

It is of course clear from this testimony that a deal was struck between the detective and the witness. But the important consideration for our purposes here is the scope of this deal. Hargrove was not promised immunity. He was

simply promised that the officer with whom he spoke would not personally arrest him, and, although that officer also promised to use his influence with the prosecutor's office, both he and Hargrove realized that the ultimate decision on Hargrove's prosecution was completely out of their hands. Furthermore, it appears that the promise of "best efforts" was left at that, with no further communication concerning the deal. Finally although Coffield stated that he had told Lyle of the deal immediately prior to Boone's trial, he did not say that Lyle at that time agreed to exercise his discretion in favor of granting immunity to Hargrove.

Another witness at the hearing was Lieutenant Robbins, Detective Coffield's partner. He stated that he was not directly involved in the negotiations with Hargrove, as these were personally handled by Coffield. He also testified that he could not recall whether or not these negotiations and the deal with Hargrove were brought to Lyle's attention during pretrial discussions among the three men. (Plenary Hearing Transcript, p. 44).

Lyle himself appeared at the plenary hearing, testifying that, as far as he could remember, no one had mentioned anything to him about a promise of immunity for Hargrove, although he did understand that Hargrove would be dealt with more leniently. He stated that it was in fact up to him, and not Detective Coffield, to decide whether or not Hargrove would be prosecuted.

A newspaper article was introduced at the hearing, in which both Lyle and his superior, Virginia Beach Commonwealth's Attorney Andre Evans, are quoted with reference to the Boone trial and Hargrove's apparent freedom from prosecution. Evans is quoted as saying that he had intended to charge Hargrove with the robbery, but decided against it after talking with the police. However, the article was written approximately one year after Boone's trial, and at the hearing Evans testified that he had had no communica-

tion with the police on this matter until just before the article was published. He also stated that he had not been directly involved in the Boone case, and that the case had been in the hands of Joe Lyle. Lyle was quoted as stating that his inclination would have been toward prosecuting Hargrove, at the same time recommending leniency. The article goes on to say, however, that the ultimate decision was up to Evans. Whatever the article establishes—and Evans indicated at the hearing that he believed himself to have been accurately quoted—it says nothing about the situation existing at the time of Hargrove's testifying at Boone's trial, and that is the point in time with which this Court is most concerned.

To summarize briefly, the evidence indicates that Detective Coffield made certain promises to Hargrove in return for his promise of cooperation, but that both knew that any decision regarding the ultimate handling of Hargrove's case was within the discretion of the prosecutor's office, and that an element of risk was involved. The full extent of this deal may have been communicated to the Assistant Commonwealth's Attorney before Boone's trial, but that official made no definite representation at that time that he would honor the Detective's wishes.

Against this background must be placed the actual occurrences at the Boone trial. After Hargrove had taken the stand and testified as to his and Boone's participation in the Sandler robbery, Boone's attorney, Richard Brydges, vigorously cross-examined Hargrove on the issue of his continued freedom and the possibility that a deal had been made by the prosecution to get Hargrove to say the proper things and insure Boone's conviction. Hargrove freely admitted that he had not been charged with anything as of that time, but he denied that he had been promised that no charges would be brought in the future.

Q And they said if you told them all about it they wouldn't charge you with anything?

A No, they told me it would be better for me to help them.

Q Right. But you haven't been charged with any offense yet?

A No. (State Court Transcript, p. 116.)

In his closing argument, the Assistant Commonwealth's Attorney, Lyle, went over all the evidence that had been presented, and stressed the testimony of Hargrove, representing to the jury that this testimony was the product of an active conscience. The defense attorney, Brydges, countered this representation with a very forceful argument that Hargrove's testimony must have been the product of a deal whereby he would cement the Commonwealth's case against Boon in exchange for his freedom. On rebuttal, the following exchange occurred between Brydges and Lyle:

Now, as I say, it's up to the Commonwealth which can designate in what order these cases are to be tried. We chose to try Leroy Boone today, separately, and that's our law-given right.

And I take exception to Mr. Brydges' inferences that Mr. Hargrove will walk the streets free the rest of his life notwithstanding—

Mr. Brydges: Now, if Your Honor please, I object to that, and I will ask the Court to grant me a mistrial on that, because there is no evidence here that this man is charged or going to be charged—

The Court: The jury is going to consider the evidence that was presented here on the witness stand. I recall Mr. Hargrove stated that he was not charged at this point. And that is as much as the jury can consider. And I think argument should be limited to that.

Mr. Lyle: All right, sir.

Mr. Brydges: Sir, I save the point on the motion for mistrial, if Your Honor please.

The Court: Yes, sir. (State Court Transcript, pages 289-290.)

The question now before us is whether, in light of the "negotiations" that had taken place before trial, Lyle's representations to the jury regarding immunity for Hargrove were so misleading that Boone was effectively denied a fair trial and must now be granted a new one. The first issue that must be disposed of is the Commonwealth's contention that Hargrove was in fact prosecuted and sentenced for a related crime, and that therefore no claim can be made that he was ever granted immunity or that Lyle's statements were in the least bit misleading. This argument is without merit. It is true that Hargrove was arrested some time after Boone's trial on a charge of breaking and entering a Virginia Beach school. But, according to the testimony of Detective Coffield, that particular crime was not among those included in Hargrove's dealings with Coffield (Plenary Hearing Transcript, page 34), and the arrest was made by an officer who had no knowledge of the earlier communications between Coffield and Hargrove (testimony of Sergeant Zello, Plenary Hearing Transcript, page 49). Furthermore, it appears that Hargrove was permitted to plead to a lesser offense, and received a twelve month suspended sentence. On these facts, it cannot be claimed that Hargrove received his just reward for the Sandler robbery, or even that the Commonwealth Attorney's Office exercised its prosecutorial discretion and charged Hargrove with a related crime. The only conclusion that can be drawn is that, after the Boone trial, Hargrove was for all practical purposes a free man.

But this by no means disposes of the larger issue of the the necessity for a new trial for Boone. In arguing that it does, the petitioner relies on the *Giglio* case, *supra,* in which the Assistant United States Attorney at trial stated in closing argument that the government's key witness had not been promised immunity, although, unbeknownst to the trial prosecutor, another Assistant United States Attorney had in fact made to the witness just such a promise. In finding that this misrepresentation to the jury had deprived the defendant of a fair trial, the United States Supreme Court made the following observations:

> "As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.,* at 269, 79 S.Ct. at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11 (a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra,* at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra,* at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' *Napue, supra,* at 271, 79 S.Ct., at 1178.
>
> In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.
>
> Here the Government's case depended entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." 405 U.S. at 153-155.

The first point to be noted in analyzing the language of *Giglio* is that that decision was based upon the relationship

between one prosecutor and another in the same office. In effect, the promise made by one was imputed to the other, and the failure to expose this promise at trial resulted in a suppression of evidence. In the present case, the alleged promise was made by an investigating officer, not a prosecutor, and in our opinion this distinction is not one without a difference. This Court has found no case holding that the detective-prosecutor relationship is to be viewed in the same light as the prosecutor-prosecutor relationship governed by *Giglio*. In *Moore* v. *Illinois*, 408 U.S. 786 (1972), the *dissent* did advance the belief that a police officer is part of the governmental entity, and indicated that *Giglio* may cover the situation in which a police officer has suppressed certain evidence. But the majority did not address this precise question, and, as the Second Circuit noted in *United States* v. *Lombardozzi*, 467 F.2d 160 (2d Cir. 1972), the majority may have purposefully excluded this issue from its opinion in order to express its lack of support for the minority position. Furthermore, the majority in *Moore* stated that it "[knew] of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." 408 U.S. at 795.[2]

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[2] The following language from *United States* v. *Ash*, 413 U.S. 300 (1973), may be read as a retrenchment from the majority ruling in *Moore:*

> "Throughout a criminal prosecution the prosecutor's ethical responsibility extends, of course, to supervision of any continuing investigation of the case. By prescribing procedures to be used by his agents and by screening the evidence before trial with a view to eliminating unreliable identifications, the prosecutor is able to minimize abuse in photographic displays even if they are conducted in his absence." 413 U.S. at 320.

However, we do not believe that this supervisory duty placed upon the prosecutor is of such a nature as to trigger the Giglio mandate. If the Supreme Court were going to expand the scope of such an important case, it almost certainly would have done so in more explicit terms than these.

If the actions of Detective Coffield are not directly imputable to Assistant Commonwealth's Attorney Lyle, then any finding of impropriety must be based upon the actions of Lyle himself and the petitioner has not carried the burden of demonstrating that Lyle attempted to subvert the judicial process. Neither Lyle nor Robbins can remember Lyle's being told about Coffield's deal, and Coffield, who does remember this, does not claim that Lyle at that time acquiesced in the arrangement. It is true that Lyle did in fact choose not to prosecute Hargrove for he Sandler robbery, but this does not conclusively prove that this decision had been made prior to Boone's trial or that Lyle deliberately hid this decision from the jury. *Reagor* v. *United States*, 488 F.2d 515 (5th Cir. 1973). The evidence before us could equally well support a finding that Lyle, at the time of Boone's trial, planned to charge and prosecute Hargrove for the Sandler robbery or a related crime, but upon consideration of the Detective's actions decided after the trial that Hargrove should not be punished. As we read *Giglio*, such circumstances would not require that Boone be given a new trial. The mere fact that Hargrove was dealt with more leniently than Boone says nothing about the fairness of Boone's trial.

But even if *Giglio* were applicable to the case at hand, this Court is not of the opinion that a new trial would be mandated. *Giglio* holds that, in a case involving the "nondisclosure of evidence affecting credibility," the suppressed evidence must be ruled "material" before a new rule is required, and this materiality standard is defined as calling for a "reasonable likelihood" that the evidence "could . . . have affected the judgment of the jury." 405 U.S. at 154. After carefully reviewing the transcript of Boone's State court trial, we do not find that this "reasonable likelihood" standard could be met.

It is true that some of the evidence put forward by the prosecution was not very strong. Boone's buying a car soon after the robbery, his being arrested with a silver dollar in his pocket, and the jacket seized during a search of his car may be discounted as having any bearing on Boone's guilt or innocence, and the slightness of these particular shreds of evidence was adequately exposed by Brydges at trial. There was no positive eyewitness identification of Boone (the only non-robber present during the crime was the night watchman, and he was unable to identify anyone). Nor were there any fingerprints taken that would link Boone with the Sandler robbery. But there was the testimony of one Wallace Hines, a friend of Boone's who stated under oath that the day after the robbery Boone approached him, flashed a roll of money, and told him that he had robbed Sandler's the night before. Hines' character was apparently less than ideal, and at trial it emerged that he had, under somewhat questionable circumstances, been the one to lead the police to where the Sandler proceeds had been buried. But Brydges vigorously pursued these potential weaknesses in Hines' story. There was also the testimony of Fay Simpson, a former girlfriend of Boone, who testified that at some time after the robbery she had ridden with Boone to the place where the money had been buried, where Boone looked into a hole and exclaimed that "somebody got it." (State Court Transcript, page 173). She also stated that just before their ride Boone had thrown her a roll of money for her to count, and that the roll contained $500. In addition, the robbery was accomplished with a .38 caliber pistol, which Hargrove testified belonged to Boone. The search of Boone's car, while not uncovering the gun, did turn up a partial box of .38 shells. Boone's father made an attempt to explain the presence of these shells, but his story was quite confused and unconvincing.

Equally unconvincing were the witnesses who attempted to provide Boone with an alibi. It is certain that Boone, Hargrove and the other youth charged with the robbery were at an all-night party at some times during the night of the robbery. The important question was whether Boone left the party during the early morning hours. Several witnesses stated that they had not seen Boone leave at all until the next morning. But the party took place throughout a four room house with two exits; there were thirty or thirty-five people there; beer was consumed; and all the witnesses admitted that they did or could have slept during part of the night. In addition, each witness put Boone's arrival at the party (8:00 P.M.) and departure (7:00 A.M. the next morning) at exactly the same times; given the nature and size of the party, there is a strong indication that such uniform recollections were the product of collusion rather than mutual observation of the facts.

Finally, it should be stressed that Boone's attorney made as searing an attack against Hargrove's testimony as can be imagined. Hargrove admitted on the witness stand that he was wearing clothes bought with the money taken from Sandler's and that he was driving a car and cooking on appliance financed through the same source. He also admitted that he had not yet been charged with anything, although he freely admitted participation in the crime for which Boone was facing a possible sentence of life plus twenty years. The congruity of this situation was not lost upon Mr. Brydges, and he made certain that the jury was well aware of the odor of a possible deal.

In light of the state of the evidence as recounted above, this Court is unable to say that a disclosure by the prosecution of an equivocal deal entered into by Hargrove and a police officer would be "reasonably likely" to cause the jury to change its verdict from guilty to innocent. In *Giglio*, it-

self, the witness whose credibility was put in question was virtually the prosecution's entire case, and any evidence that would have tended to undercut that credibility would necessarily have affected the jury's decision. Such is not the case here.

For all of the reasons mentioned above—the risky nature of the deal and Hargrove's knowledge of that risk, the fact that the deal was made by a police officer and not a member of the prosecutor's office, the extent of the evidence against Boone in addition to the Hargrove testimony and the inherent weakness of that testimony as exposed by defense counsel—this Court is not convinced that the petitioner's state court trial was so unfair as to necessitate a new trial. The petition for writ of habeas corpus is therefore Ordered Dismissed.

The petitioner may appeal in forma pauperis from this *final order* by filing a *written* notice of appeal with the Clerk of this Court, Post Office Box 1318, Norfolk, Virginia 23501, within thirty (30) days from this date. For the reasons above stated, the Court declines to issue a certificate of probable cause.

Let the Clerk send certified copies of this Order to the Attorney General of Virginia, the Clerk of the Circuit Court of the City of Virginia Beach, and to the petitioner.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
February 25, 1975

APPENDIX B

Leroy Boone, Appellant,

v.

E. L. Paderick, Superintendent of the Virginia State Penitentiary, Appellee.

No. 76-1090

United States Court of Appeals,
Fourth Circuit.

Argued June 10, 1976.

Decided Sept. 13, 1976.

* * *

Before Haynsworth, Chief Circuit Judge, and Winter and Craven, Circuit Judges.

Craven, Circuit Judge:

Imprisoned for life plus 20 years for armed robbery and statutory burglary, Boone unsuccessfully petitioned the district court for a writ of habeas corpus. We reverse and hold that the writ should issue because the prosecutor concealed an offer of favorable treatment to Boone's principal accuser. Had the jury known of the prosecution witness' compelling motivation to establish Boone's guilt, there is a reasonable likelihood its verdict might have been different. Under such circumstances there is a denial of due process under *Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194,

10 L.Ed.2d 215 (1963); *Mooney* v. *Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

I.

The promise of favorable treatment in return for cooperation with the prosecution, upon which Boone's petition rests, was made to Eugene Hargrove by Detective Coffield of the Virginia Beach Police Department. According to the record, Coffield told Hargrove that he knew that he (Hargrove) was involved in the robbery of Sandler's Seafood storehouse, that the police department would soon make arrests in the case, and that he better cooperate.

Hargrove did not at once agree to cooperate but later did so upon Coffield's promise that he would not arrest him for the Sandler burglary or for any other offenses which he knew Hargrove to have committed, and that he would use his influence with the Commonwealth Attorney in order to see that he would not be prosecuted.[1] According to Coffield, Mr. Lyle, the prosecutor in Boone's case, was told about Coffield's promises to Hargrove.

Lyle also testified at the habeas proceedings. He did not deny that Coffield told him of the promises but said he did not remember. Curiously, he stated that, in his own mind, he at times believed it possible that Hargrove would be prosecuted but that he understood leniency would be appropriate.

Boone's attorney was never informed by the prosecutor or the detective or anyone else of Coffield's representations to Hargrove. But at trial, he apparently suspected as much and

[1] Coffield emphasized at the habeas corpus hearing that he told Hargrove this was a limited promise, and that while he would use his influence with the Commonwealth Attorney, there "was an element of risk here," which Hargrove understood, because he could not control the actions of others.

attempted to prove Hargrove's bias. On cross-examination he established that Hargrove had not been arrested or prosecuted in connection with this offense, which he freely admitted committing, and additionally brought out that Hargrove was allowed to retain property which he purchased with his share of the proceeds of the crime. But counsel got nowhere in his effort to uncover the prosecutorial bargain. Aided by the prosecutor, Hargrove revealed nothing of Coffield's promises.[2]

[2] [Brydges] Q Are you charged with any crime? Are you charged with any offense regarding this break-in?

[Hargrove] A No.

Q *Are you going to be charged with any?*

Mr. Lyle: Your Honor, he doesn't know whether he is going to be charged.

Mr. Brydges: Well, he can tell me whether he has been told.

Mr. Lyle: If he knows.

Q What did they tell you about being charged?

A What's that?

Q What did they tell you about whether or not you were going to be charged? You have been free ever since, haven't you?

A Yes.

Q Okay. Now, what are they going to do about your involvement in it?

A Well, they told me they already knew what had happened. And they told me exactly the same thing I told them.

Q They told you what had happened so you told them?

A Yes, sir.

Q So you just told them right back?

A No, I went home. I left and came back the next day.

Q And then you told them all about it?

A Yes.

Q *And they said if you told them all about it they wouldn't charge you with anything?*

A *No, they told me it would be better for me to help them.*

Q Right. But you haven't been charged with any offense yet?

A No.

Q I mean, after this trial did they tell you that you were going to be charged with it?

A I don't know.

In closing argument, the prosecutor portrayed Hargrove as one who will swear to his own hurt and change not:

> And at no time is anybody more apt to tell the truth than when they are saying something that actually hurts. And that is the principle of law, Gentlemen, *that when a declaration is made that if it hurts you it is more likely to mean the truth,* no question about that.
>
> *And take that test and apply it to Eugene Hargrove, for instance, who has freely admitted participatnig in a felony, two felonies, which carry the sentences which the Judge just outlined to you.*

(Emphasis added.)

Later, he did not shrink from depicting Hargrove as conscience stricken, and crediting him with altruism, clearly implying that Hargrove would not go unpunished:

> But I submit to you that we are—and I say we I mean you ought to thank God that every now and then *somebody's conscience rises to the top and somebody tries to do the right thing. . . .*
>
> Every now and then we are lucky enough—and I say we, I mean you, too, because you live in this Commonwealth and it's your health and safety that's at stake, just like everybody else's. *We are lucky enough to get a case where one of the participants tries to do the right thing.*
>
> *Now, as I say, it's up to the Commonwealth which can designate in what order these cases are to be tried. We chose to try Leroy Boone today, separately, and that's our law-given right.*
>
> And I *take exception to Mr. Brydges' inferences that Mr. Hargrove will walk the streets free the rest of his life notwithstanding. . . .*[3]

(Emphasis added.)

Q You get on the stand here today and you tell this 12-man Jury that you broke into the place and tied up the watchman and stole a lot of money; bought yourself a range, some furniture, some clothes and an automobile and you sit there scot-free, right?

A Yes.

Q And in exchange for that you are going to tell on Leroy Boone, isn't that about the size of it?

A Yes, but—

Q All right, let's get right to the heart of the matter—

Mr. Lyle: Let him answer the question.

The Court: What was the rest of that, Mr. Hargrove.

A Not in exchange of that. (Emphasis added.)

II.

A.

[1] Whether *Giglio* applies depends upon whether the jury may have been falsely led to believe that Hargrove was motivated solely by conscience and altruism and that there was no deal when in truth he responded to Coffield's promises. *See United States* v. *Agurs,* ..... U.S. ....., ... n. 9, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Hargrove's flat denial that "they" had told him he would not be charged[4] skirts the edge of perjury only because the questioner knew nothing of Coffield's role and "they" embraces others who promised nothing. But the prosecutor made statements which were clearly intended to give the impression that Hargrove knew nothing about possible lenient treatment, that he testified against, rather than in aid of, his penal interest, and that his testimony in general was the product of an active conscience.

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[3] Hargrove was never prosecuted.

[4] *See* note 2 *supra.*

We hold that Hargrove's general denial of any promise of leniency, when coupled with the prosecutor's emphasis upon altruistic motivation, constitutes false evidence of which the prosecutor knew or should have known. *Cf. Mooney* v. *Holohan, supra.*

B.

The district court reasoned that *Giglio* was inapplicable because the promise that was made emanated from the police and not the prosecutor's office, and because Coffield lacked authority to grant immunity. We disagree.

"[2] The district court stated that it found no case holding that the detective-prosecutor relationship is to be viewed in the same light as the prosecutor-prosecutor relationship governed by *Giglio*." But in *Barbee* v. *Warden,* 331 F.2d 842, 846 (4th Cir. 1964),[5] we held that where material evidence which tends to exculpate the defendant is not disclosed, such failure is not neutralized because it was in the hands of the police rather than the prosecutor.

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure.

Id. at 846 (footnote omitted).

[3] Alternatively, we may also rest decision on attribution of the promise to the prosecutor's office. Coffield in-

[5] *See, e.g., United States* v. *Bryant,* 142 U.S. App. D.C. 132, 439 F.2d 642, 650 (1971); *Emmett* v. *Ricketts,* 397 F.Supp. 1025, 1040-42 (N.D. Ga. 1975).

formed Lyle of the promise. Lyle, while stating he did not remember being told of the promise and recounting his subjective determination that, in any case, he was not foreclosed from prosecuting Hargrove, did not deny it.[6] If, as in *Giglio,* knowledge is imputed from one member of the prosecutor's office to another where there was no actual communication, we believe *a fortiori* it must be attributed to a member of that office who had been told of the promise.

[4] Similarly, we believe that *Giglio* is applicable despite Coffield's lack of authority to bind the government to any agreement and the tentativeness of the promise. In *Giglio,* according to the affidavit of one member of the prosecutor's office, the cooperating witness was told "that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted." *Id.* 405 U.S. at 153, 92 S.Ct. at 765 (footnote omitted). Furthermore, the district court in *Giglio* had found that, however definite the first promise had been, the prosecutor who made it was not authorized to do so. The Supreme Court held that neither fact was fatal to defendant's claim. Instead, the Court focused upon the fact that a no-prosecution promise had in fact been made, and that both the witness, in his testimony, and the prosecutor, in summation, had stated otherwise. The Court held that, since the government's case depended almost entirely on this witness' testimony, his "credibility as a witness was . . . an important issue in the case, and evidence *of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.*" *Id.* at 155, 92 S.Ct. at 766 (emphasis added).

[6] Since it was more than six years between the trial and the habeas corpus proceeding, the lack of a sharp memory of the details of pretrial negotiations is understandable.

[5] Finally, we note that rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced —the more uncertain the agreement, the greater the incentive to make the tesimony pleasing to the promisor.

III.

As the district court correctly noted, finding *Giglio* applicable to this case does not determine whether a new trial is required. However, we may put to one side one of the two factors which he considered in determining a new trial unnecessary—defense counsel's "searing attack against Hargrove's testimony." No matter how good defense counsel's argument may have been, it was apparent to the jury that it rested upon conjecture—a conjecture which the prosecutor disputed.

[6, 7] The controlling issue, and one which we find difficult, is the materiality of the evidence withheld. Under *Giglio,* "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .' " *Id.* at 154, 92 S.Ct. at 766. In determining that issue, we must examine both the importance of Hargrove's testimony, which would be affected by his credibility, and the weight of the independent evidence of guilt.

The physical evidence introduced at trial included only a silver dollar found in Boone's pocket when arrested (a sizeable number of silver dollars were taken from Sandler's), a green jacket seized during a search of Boone's car (a robber was described to have worn khaki clothing), a flashlight

found at the robbery scene, and a partially filled box of .38 caliber ammunition found in Boone's car. The district court correctly viewed as insignificant both the silver dollar and the jacket. The possession of neither was incriminating. He similarly discounted evidence that shortly after the robbery Boone purchased a car, paying approximately $650 cash, perhaps because Boone's father and grandfather swore they provided the car money.

The district court treated the discovery of the .38 caliber ammunition differently, considering it significant evidence. However, at trial, the *only* evidence identifying a .38 as the weapon used in the crime was the testimony of Hargrove.[7] The State, on appeal, also tells us that the flashlight was an incriminating item, contending it was Boone's flashlight. Again, however, *only* Hargrove's testimony identified it as Boone's.

No other physical evidence linked Boone to the crime. There were no fingerprints: the victim could make no identication at all.

Three witnesses implicated Boone in the crime. Of these Hargrove was by far the most important.[8] He testified that he was a participant in the crime along with Boone and another individual, Billups. He stated that, on the way home

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[7] Witness Hines did apparently tell the police that Boone was the gunman in the robbery and that the weapon involved was a .38, and it was upon this information that a search warrant for Boone's car was obtained. Transcript at 141-43. However, Hines did not give such testimony at trial, and the jury did not otherwise learn of his statements to the police.

[8] A March 9, 1969, article in the Virginia-Pilot on the Boone prosecution attributes to Lyle the following statement: "without [Hargrove's] testimony we wouldn't have gotten a conviction on either of the other two men [Boone and Billups]." Petitioner's Exhibit 2. At the habeas corpus proceeding, Lyle was asked about this statement. He responded that he did not "recall that remark," but he could not "deny that I told him that though . . . ." App. 168-69.

from a party in Norfolk, Boone proposed that they burglarize Sandler's; that the axe and crowbar used to break in, as well as the .38 caliber pistol and flashlight, were Boone's; that Boone alone wore a mask and carried a gun during the robbery; that after breaking into the building and tying up the night watchman, they broke into the vault and removed the money; and that, after splitting up the cash, they buried the stolen bonds near Lake Smith.

Wallace Hines testified that on the afternoon after the robbery[9] he talked to Boone. Boone, according to Hines' testimony, was displaying a sizeable roll of money and wanted to "shoot some pool . . . for some money." Later that evening, Hines testified, Boone told him he got the money at Sandler's.[10] Hargrove's name was also mentioned.

Hines also testified that he discovered some of the bonds at Lake Smith lying on the ground while he was walking through the area.[11] And he testified that he told the police about the location of the bonds, led them to the place they were buried, and provided other information while in jail on charges of breaking into a school.

Fay Simpson, Boone's former girlfriend, testified that some time in January she, Boone, "and this guy named

[9] The robbery occurred in the early morning hours of January 14.

[10] According to questions asked by defense counsel Brydges on cross-examination, Hines' trial testimony concerning the circumstances of Boone's admission differed from that given at the preliminary hearing. See App. 70, 73. The record does not contain a transcript of the preliminary hearing, if such was ever made.

[11] Hines denied that anyone told him the location of the buried bonds. Both the prosecutor, in closing argument, ("Gentlemen, now whether he actually found that bond or whether he had sources of information that we don't know about. I don't know." Transcript at 259.) and the district judge ("[A]t trial it emerged that he had, under somewhat questionable circumstances, been the one to lead the police to where the Sandler proceeds had been buried.") viewed this account somewhat skeptically.

Bubba" went riding around Lake Smith; that they stopped the car near the lake and just off Shell Road (the area where the bonds were found) and went to a hole in the grass;[12] and that Boone stated, "Somebody got it." She further testified that after they got back to Norfolk she asked about this incident and the origin of the $500 Boone had in his possession and was told "Binky, and Fella and himself had stole some money . . . [and] that somebody had taken it from him, some of it." Boone did not tell her where the money had been stolen.[13]

The defense offered alibi witnesses who testified that Boone was present at an all-night party during the robbery, and that he did not leave until 7 a.m. the next morning. Boone's father and grandfather testified that they provided him with the cash for his automobile purchase. And his father also testified that he owned the .38 caliber ammunition found in Boone's car.[14] Finally, Boone took the stand and denied any involvement in the robbery.

[8]The task of determining whether there is a "reasonable likelihood" that evidence of the promise of favorable treatment to Boone would have affected the judgment of the jury is not an easy one. It is especially difficult in a case such as this where internal conflicts and inherent improba-

[12] Clearly, circumstantial evidence points to the fact that this hole was the same one in which the police had found the bonds. However, the prosecutor did not have Simpson identify the pictures of the hole from which the bonds were recovered. These pictures had been introduced into evidence. Exhibits 13 & 14, Transcript at 73. And Hargrove, on cross-examination, stated that there were "a lot of" holes in the area where they buried the bonds. App. 86.

[13] On cross-examination and in summation, defense counsel Brydges contended that Simpson's testimony differed dramatically from her pretrial statements to him. Transcript at 181-82; App. 105-06.

[14] As the district court noted, this explanation of the source of the ammunition was in part inconsistent with Boone's own testimony.

bility in almost every witness' testimony suggests the possibility of perjury. We believe, however, that with the evidence of Coffield's promise and without the prosecutor's misrepresentation that there was no promise of favorable treatment and his misinterpretation that Hargrove testified against his penal interest and out of a sense of conscience, which buttressed his credibility, there is reasonable likelihood that the jury would have reached a different result. Only Hargrove testified concerning the details of the robbery from direct observation; his testimony was critical to the conviction. Without him the jury would have known only of vague admissions and weak circumstantial evidence linking him to the robbery.

On remand, the district court will issue the writ unless the state elects within a reasonable time to try Boone again.

Reversed.